A **PEMBINAAN PERWIRA HARTA SDN BHD**

v.

LETRIKON JAYA BINA SDN BHD

B FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
C SULONG MATJERAIE FCJ
[CIVIL APPEAL NO: 02-62-10-2011(W)]
15 JANUARY 2013

D ***CONTRACT:*** *Building sub-contract - Omission of sub-contract works - Whether appellant entitled to omit works of respondent - Whether appellant could lawfully invoke cl. 19 of agreement to omit whole of sub-contract works resulting in termination of sub-contract - Whether cl. 19 a variation clause - Whether cl. 19 a separate and independent clause to reduce scope of sub-contract works*

E The appellant was engaged by Syarikat Perumahan Negara Berhad-Lembaga Tabung Angkatan Tentera Joint Venture as the main contractor for an army housing project ('the project'). By a Letter of Award, the appellant appointed the respondent as the
F sub-contractor to carry out and complete some piling and building works ('the sub-contract'). The respondent, however, could not execute the works, by reason that the piling works on the project remained unfinished. Due to difficulties with the project, the appellant ceased to be the main contractor. Thereafter, the
G appellant invoked cl. 19 of Appendix A-Supplementary Terms and Conditions attached to the Letter of Award to omit wholly the remaining works awarded to the respondent under the sub-contract. The respondent then brought a suit against the appellant, claiming that the appellant was not entitled to omit the
H remaining works of the respondent. The High Court found that cl. 19 could not be relied upon by the appellant to omit all remaining works of the respondent. The Court of Appeal upheld the decision of the High Court. Thus, the appellant appealed to this court. The principal issue for consideration in this appeal was whether
I the appellant could lawfully invoke cl. 19 to omit the whole of the sub-contract works that effectively resulted in the termination of the sub-contract.

Held (dismissing appeal with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Clause 19 was a variation clause dealing with omission of work and not termination of the sub-contract since termination was not mentioned anywhere therein. Upon close examination of cl. 19, the right of omission conferred by the first sentence of this variation clause was only to omit part (either partially or wholly of that part) of the works comprised in the sub-contract. The whole works under the sub-contract was referred to in the phrase "sub-contract works" and not "works". Bearing in mind that the sub-contract works included piling and building works, cl. 19 in its proper context could be utilised to omit some of the piling or the whole of the piling works but the clause could not be utilised to omit the whole sub-contract of the piling and building works altogether. (para 12)

(2) The words "to omit wholly or in part of the works" in cl. 19 could not be equated to mean "to omit wholly the sub-contract works". The second sentence of cl. 19 states that the value of the omitted works was to be deducted from the sub-contract sum. This deduction could only apply if the omission was for part of the sub-contract works, otherwise, the whole of the sub-contract sum would be deducted against itself, which was absurd. (para 13)

(3) On close examination of the third sentence in cl. 19, the clause itself through its exercise precludes the respondent from all claims whatsoever. If this clause was construed to permit the cancellation of the sub-contract, it would unreasonably result in the respondent forfeiting its claim for unpaid works done up to the moment of the exercise of that clause. This was plainly unjust and unreasonable. (para 14)

(4) The specific provision on termination of the sub-contract had been agreed by the parties as contained in cl. 11.6.3 and cl. 12 of the Supplementary Terms and Conditions which were conditioned on default on the part of the respondent. It could not have been within the contemplation of the parties to the sub-contract that either one of them was empowered to prevent the other from performing the sub-contract. It is a

general principle of law of contract that one party shall not prevent the other from performing and completing the contract. It was thus sufficient to state that cl. 19 was not a termination clause but a separate and independent clause on the appellant's rights to only reduce the scope for the sub-contract works. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dilantik oleh Syarikat Perumahan Negara Berhad-Lembaga Tabung Angkatan Tentera Joint Venture sebagai kontraktor utama bagi projek perumahan askar ('projek'). Melalui Surat Award, perayu telah melantik responden sebagai sub-kontraktor untuk menjalankan dan menyiapkan kerja-kerja pemantakan dan pembinaan ('sub-kontrak'). Responden, walaubagaimanapun, tidak boleh melaksanakan kerja-kerja disebabkan kerja-kerja pemantakan masih belum selesai. Disebabkan kesukaran ini, perayu tidak lagi menjadi kontraktor utama. Selepas itu, perayu telah menggunakan kl. 19 Lampiran A-Tambahan Terma dan Syarat yang dilampirkan bersama dengan Surat Award untuk tidak memasukkan langsung baki kerja-kerja yang telah diawardkan kepada responden di bawah sub-kontrak. Satu tindakan telah difailkan terhadap perayu di mana responden mendakwa bahawa perayu tidak berhak untuk tidak memasukkan baki kerja-kerja responden. Mahkamah Tinggi mendapati bahawa perayu tidak boleh bergantung kepada kl. 19 untuk tidak memasukkan baki kerja-kerja responden. Mahkamah Rayuan mengekalkan keputusan Mahkamah Tinggi. Oleh itu, perayu merayu ke mahkamah ini. Isu utama untuk pertimbangan di dalam rayuan ini adalah sama ada perayu boleh dengan sah menggunakan kl. 19 untuk tidak memasukkan keseluruhan kerja-kerja sub-kontrak yang menyebabkan pembatalan sub-kontrak.

Diputuskan (menolak rayuan dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Klausa 19 adalah klausa pengubahan berurusan dengan tidak memasukkan kerja-kerja dan bukannya pembatalan sub-kontrak memandangkan pembatalan tidak dinyatakan di mana-mana dalamnya. Atas pemeriksaan teliti kl. 19, hak tidak memasukkan yang diberi oleh ayat pertama klausa pengubahan ini adalah hanya untuk tidak memasukkan sebahagian (sama ada sebahagian atau keseluruhannya daripada bahagian itu) kerja-

kerja yang terkandung di dalam sub-kontrak. Segala kerja-kerja di bawah sub-kontrak dirujuk dalam frasa "kerja-kerja sub-kontrak" dan bukan "kerja-kerja". Disebabkan kerja-kerja sub-kontrak termasuk pemantakan dan pembinaan, kl. 19 dalam konteks yang betul boleh digunakan untuk tidak memasukkan sebahagian daripada kerja pemantakan atau seluruh kerja pemantakan tetapi klausa itu tidak boleh digunakan untuk tidak memasukkan seluruh sub-kontrak kerja-kerja pemantakan dan pembangunan sama sekali.

(2) Perkataan-perkataan "untuk tidak memasukkan secara keseluruhan atau sebahagaian kerja-kerja" di dalam kl. 19 tidak boleh disamakan sebagai bermakna "untuk tidak memasukkan secara keseluruhan kerja-kerja sub-kontrak". Ayat kedua kl. 19 menyatakan bahawa nilai kerja-kerja yang tidak dimasukkan harus ditolak daripada jumlah sub-kontrak. Penolakan ini hanya boleh digunapakai jika peninggalan adalah untuk sebahagian daripada kerja-kerja sub-kontrak, jika sebaliknya, seluruh jumlah sub-kontrak akan ditolak terhadap jumlah yang sama yang mana itu adalah tidak masuk akal.

(3) Atas pemeriksaan teliti ayat ketiga kl. 19, klausa itu sendiri melalui perlaksanaannya menghalang responden daripada membuat apa-apa tuntutan. Jika klausa ini telah ditafsirkan untuk membenarkan pembatalan sub-kontrak, ia akan secara tidak munasabah mengakibatkan responden melucuthakkan tuntutannya bagi kerja-kerja yang tidak dibayar yang telah dilakukan sehingga masa perlaksanaan klausa. Ini adalah jelas tidak adil dan tidak munasabah.

(4) Peruntukan khusus pembatalan sub-kontrak telah dipersetujui oleh pihak-pihak seperti terkandung dalam kl. 11.6.3 dan kl. 12 Tambahan Terma dan Syarat yang telah disyaratkan atas keingkaran pihak responden. Ia tidak mungkin dalam jangkaan pihak-pihak kepada sub-kontrak bahawa salah satu daripada mereka diberi kuasa untuk menghalang pihak yang lain daripada melaksanakan sub-kontrak. Ia adalah satu prinsip umum undang-undang kontrak bahawa satu pihak tidak boleh menghalang pihak yang lain daripada melaksanakan dan menyempurnakan kontrak. Oleh itu, ia adalah memadai untuk menyatakan bahawa kl. 19 bukan klausa pembatalan tetapi klausa yang berasingan dan bebas berkaitan hak-hak perayu untuk hanya mengurangkan skop kerja-kerja sub-kontrak.

A **Case(s) referred to:**

Commissioner For Main Roads v. Reed & Stuart Pty Ltd & Anor [1974] 48 ALJR 461 ***(refd)***

Sacon Constructions Pty Ltd v. Kezarne Pty Ltd [1997] NSWSC 474 ***(refd)***

Tan Hock Chan v. Kho Teck Seng [1979] 1 LNS 110 FC ***(refd)***

B *Trustees of the Stratfield Saye Estate v. AHL Construction Ltd [2004] EWHC 3286 (TCC)* ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 33 r. 2

C *For the appellant - Nitin Nadkarni (JL Foo, Hairul Azam & ML Tan with him); M/s Azam Lim & Pang*

For the respondent - Lim Chong Fong (Farez Jinnah with him); M/s SC Lim & Partners

[Editor's note: For the Court of Appeal judgment, please see Pembinaan Perwira

D *Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2011] 1 LNS 1769].*

Reported by Suhainah Wahiduddin

E

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

F **[1]** This is an appeal by the appellant against the decision of the Court of Appeal on 25 April 2011 dismissing the appellant's appeal against the decision of the High Court dated 13 April 2009. The appellant was granted leave to appeal against the decision of the Court of Appeal on the following questions of law:

G (a) Where a contract for construction work ("Construction Contract") provides that the main contractor may omit any works awarded to the sub-contractor, whether the omission of all remaining works under construction contract amounts to an unlawful termination or repudiation of the construction

H contract;

(b) Whether a clause in a construction contract allowing one party to terminate the construction contract without giving any reason, is inconsistent with a clause in the same construction

I contract which allows for termination upon default by a party;

(c) Whether a clause in a construction contract allowing the whole or part of the works to be omitted without giving any reason, is inconsistent with a clause in the same construction contract which allows for termination upon default;

(d) Whether there is any principle of law that prohibits two contracting parties from agreeing that one of the parties may, without giving any reason, omit the whole or part of the works to be performed by the other party;

(e) Whether there is any principle of law that prohibits two contracting parties from agreeing that one of the parties may, without giving any reason, terminate the contract; and

(f) Whether the exercise by one party of a contractual power to omit the whole or part of the works without giving any reasons is, in law, an act preventing the other party from performing its contractual obligations.

Background Facts

[2] The relevant background facts of the case may be summarised as follows:

[3] The appellant was engaged by Syarikat Perumahan Negara Berhad-Lembaga Tabung Angkatan Tentera Joint Venture as the main contractor for an army housing project known as "Cadangan Pembangunan Perumahan Angkatan Tentera di atas Tanah Milik Kerajaan di atas Lot PT 2082 Mukim Ampang, Kuala Lumpur" ("the Project").

[4] By a Letter of Award dated 12 March 2004, the appellant appointed the respondent as the sub-contractor to carry out and complete the "Building and Mechanical & Electrical Works, External and Internal Electrical and Telephone Installation for Block Type C Mod A, B, C and for Block C Flat Inclusive MSB, EMSB, Gen Set, Internal Ducting and pit for Telephone and Air-conditioning and Ventilation Services for all blocks of the project" ("the Sub-contract").

[5] The respondent could not execute the sub-contractor works, by reason that the piling works on the project remained unfinished.

[6] Due to difficulties on the project, the appellant ceased to be the main contractor in December 2004.

[7] Thereafter by a letter dated 2 December 2004, the appellant invoked cl. 19 of Appendix A – Supplementary Terms and Conditions attached to the Letter of Award to omit wholly the remaining works awarded to the respondent under the sub-contract. The said cl. 19 reads as follows:

> We reserve the right to omit wholly or in part of the works from the Sub-contract. The omissions of works prescribed may be deducted from the Sub-contract sum. No claim whatsoever will be entertained for such omissions.

[8] The respondent then brought a suit against the appellant, claiming that the appellant was not entitled to omit the remaining works of the respondent.

Findings Of The High Court

[9] The sole issue determined by the High Court pursuant to O. 33 r. 2, Rules of the High Court 1980 was this:

> Whether Clause 19.0 Appendix A – Supplementary Terms and Conditions give the power or right to the defendant to remove all scope of works of the plaintiff under the Sub-contract.

[10] The learned High Court Judge found that cl. 19 could not be relied upon by the appellant to omit all remaining works of the respondent. The learned judge *inter alia* held that a literal reading of the said cl. 19 would be unreasonable as it would entitle the appellant to terminate the sub-contract without any default by the respondent, and this would be absurd. The Australian High Court case of *Commissioner For Main Roads v. Reed & Stuart Pty Ltd & Anor* [1974] 48 ALJR 461 was cited by the learned judge to support her finding on this issue wherein it was held that a clause for omission cannot be relied upon to remove works from a contractor in order to give to another contractor.

Findings Of The Court Of Appeal

[11] The Court of Appeal upheld the decision of the High Court. The Court of Appeal in its finding on cl. 19 made a pertinent observation as follows:

> This much we could add. Clause 19 could not be read *ad litteram*. As correctly submitted by learned counsel for the respondent who saw it for what it was, omission of the entire subcontract works had the effect of termination of the subcontract. Also, omission of the entire subcontract works was against the rationale of clause 19, which was to allow for the omission of works and adjustments of the amount of the subcontract when so necessitated by any variation of the main works by the employer … (See page 11 of the Additional Appeal Record).

Decision Of This Court

[12] Learned counsel for the appellant submitted before us amongst others that the court should not strike down a contract or a term in a contract on the ground that it is unreasonable, harsh and unfair. The function or role of the court is merely to interpret the provisions in the contract. To the appellant the said cl. 19 is clear and it explicitly allows the appellant to omit wholly or in part of the works from the sub-contract. The parties to the sub-contract must have agreed that the appellant can omit all of the works.

[13] Learned counsel for the appellant further submitted that the appellant and the respondent had entered into the sub-contract as a commercial transaction. Therefore if the respondent had intended to limit the rights or scope of the appellant to omit works from the sub-contract it would have requested that this be expressly worded into the sub-contract. However, this was not done. As such, there is nothing limiting the appellant's contractual right under the said cl. 19 to omit the remaining works under the sub-contract.

[14] It is also the contention of the appellant that both the High Court and the Court of Appeal in the present case were wrong in seeking to limit the bargain freely entered into by the appellant and in not finding that cl. 19 in effect allowed for termination without default notwithstanding there is the existence of other clauses in the sub-contract which provided for termination in the

event of default. To the appellant the parties can in one and in the same contract have some provisions which allow for termination for convenience and other clauses which allow for termination upon default.

[15] With respect we could not agree with the above points of contention of the appellant. The principal issue to be decided in this appeal is whether the appellant can lawfully invoke cl. 19 to omit the whole of the sub-contract works that effectively resulted in the termination of the sub-contract. We agree with the findings of the courts below that cl. 19 is a variation clause and so could not be invoked to omit the entire sub-contract works.

[16] It is to be noted that a variation clause gives power to make adjustments to the sub-contract works but not a power to cancel the sub-contract works. On this point in the English case of *Trustees of the Stratfield Saye Estate v. AHL Construction Ltd* [2004] EWHC 3286 (TCC), Justice Jackson *inter alia* had this to say:

> 46. *Provisions entitling an owner to vary the work have therefore to be construed carefully so as not to deprive the contractor of its contractual right to the opportunity to complete the works and realize such profit as may then be made*. They are not in the same category as exemption clauses. They have been common for centuries and do not need to be construed narrowly. In developed forms they now offer contractors opportunities to participate actively in the success of the project and to enhance their returns (for example, by way of value engineering or the application of concepts such as partnering).
>
> 47. However, the cases do show that reasonably clear words are needed in order to remove work from the contractor simply to have it done by somebody else, whether because the prospect of having it completed by the contractor will be more expensive for the employer than having it done by somebody else, although there can well be other reasons such as timing and confidence in the original contractor. *The basic bargain struck between the employer and the contractor has to be honoured and an employer who finds that it has entered into what he might regard as a bad bargain is not allowed to escape from it by the use of the omissions clause so as to enable it then to try and get a better bargain by having the work done by somebody else at a lower cost once the contractor is out of the way (or at the same time if the contract permits others to work alongside the contractor)*. (emphasis added)

[17] A variation clause is distinct and different from termination for convenience clause. It is a question of construction of the contract as to the extent and scope of the permissible exercise of power of a particular clause. The particular clause must be examined in itself as well as in conjunction with the other clauses in the contract. In any case whether it is a variation clause or termination for convenience clause, they cannot be exercised unreasonably in the absence of good faith. (See the case of *Sacon Constructions Pty Ltd v. Kezarne Pty Ltd* [1997] NSWSC 474). It is also to be noted the variation clause cannot be utilised to omit works to be given to others. (See the case of *Tan Hock Chan v. Kho Teck Seng* [1979] 1 LNS 110 FC).

[18] We agree with the submission of learned counsel for the respondent that by a literal reading of cl. 19, it is a variation clause dealing with omission of work and not termination of the sub-contract since termination is not mentioned anywhere therein. We are of the view upon close examination of cl. 19, the right of omission conferred by the first sentence of this variation clause is only to omit part (either partially or wholly of that part) of the works comprised in the sub-contract. We noted that the whole works under the sub-contract is referred to in the phrase "sub contract works" and not "works". Bearing in mind that the sub-contract includes piling and building works, it is our judgment that cl. 19 in its proper context can be utilised to omit some of the piling or the whole of the piling works but the clause cannot be utilised to omit the whole sub-contract of the piling and building works altogether.

[19] We also find that the term "sub contract works" and "works" are used for different purposes throughout the Supplementary Terms and Conditions of Appendix A. It is our considered view that the words "to omit wholly or in part of the works" in cl. 19 cannot be equated to mean "to omit wholly the sub contract works". This would appear to be the correct interpretation if we were to look at the second sentence of cl. 19 which states that the value of the omitted works is to be deducted from the sub-contract sum. This deduction can only apply if the omission is for part of the sub-contract works, otherwise the whole of the sub-contract sum would be deducted against itself, which in our view is absurd.

[20] Again, on close examination of the third sentence in cl. 19, the clause itself through its exercise precludes the respondent from all claims whatsoever. If this clause is construed to permit the cancellation of the sub-contract, it would unreasonably result in the respondent forfeiting its claim for unpaid works done up to the moment of the exercise of that clause. This in our view is plainly unjust and unreasonable.

[21] It is to be noted in the present case that the specific provision on termination of the sub-contract had been agreed by the parties as contained in cl. 11.6.3 and cl. 12 of the Supplementary Terms and Conditions which are conditioned on default on the part of the respondent. In this regard we would state here that it could not have been within the contemplation of the parties to the sub-contract that either one of them is empowered to prevent the other from performing the sub-contract. It is a general principle of law of contract that one party shall not prevent the other from performing and completing the contract.

Conclusion

[22] For the reasons above stated we find that it is not necessary to answer all the questions posed before us. It is sufficient for us to state here that cl. 19 of Appendix A of the Supplementary Terms and Conditions is not a termination clause but a separate and independent clause on the appellant's rights to only reduce the scope for the sub-contract works. Clause 19 could not be relied upon by the appellant to omit all scope of works of the respondent under the sub-contract. In the result, we would dismiss this appeal with costs. We award a sum of RM30,000 to the respondent as costs. The deposit is to be refunded to the appellant.